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Supreme Court, U.S.
FILED
FEB 14 1994
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No. 93-7348

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

.....

RICKY LEE PRICE,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent

.....

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

.....

REPLY TO BRIEF IN OPPOSITION

.....

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ARGUMENT

Petitioner, Ricky Lee Price, respectfully submits this Reply Brief pursuant to Rule 15.6 of the Rules of this Court in support of the Petition for a Writ of Certiorari docketed in this Court on 29 December 1993. This brief addresses responsive arguments first made in Respondent's Brief in Opposition to Petition for Writ of Certiorari.

I. FAILING TO PERMIT CAPITAL SENTENCER TO CONSIDER AND GIVE EFFECT TO PETITIONER'S EXISTING LIFE SENTENCE VIOLATED LOCKETT, PENRY, AND GARDNER.

This issue focuses on the relevance, as rebuttal to aggravation and as mitigation, of the life sentence petitioner had just begun serving for a separate murder in Virginia -- a murder used as an aggravating factor in this case and about which the sentencing jury heard substantial evidence and prosecutorial argument -- to the jury's determination of the appropriate sentence for this murder in North Carolina. The trial court denied petitioner's request that the jury be instructed on and allowed to consider the Virginia life sentence as a mitigating circumstance. Thus, the jury had no vehicle through which to consider it. The crux of the matter is simply whether this Virginia life sentence is an "aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). It was certainly relevant to explain and rebut the state's evidence and argument about the separate murder used in aggravating the sentence. *Gardner v. Florida*, 430 U.S. 349, 362 (1977). The lower court deemed this evidence "irrelevant," *State v. Price*, 331 N.C. 620, 634-35, 418 S.E.2d 169, 177 (1992), contrary to the letter and spirit of *Lockett* and its progeny. Respondent miscasts the issue as a challenge to the limitations placed on petitioner's closing arguments. [Brief in Opposition at 19-20] To the contrary, the decision below, addressing the relevance of this evidence, is at odds with one of the most settled principles of Eighth Amendment jurisprudence: petitioner's right to have his capital sentencer consider, under appropriate instructions, mitigating evidence.

Respondent argues petitioner "cannot show that this holding is in conflict with any other state or federal court decisions" and the lower court's decision is, therefore,

below is at odds with *Turner v. State*, 573 So.2d 657 (Miss. 1990), *cert. denied*, 113 S.Ct. 1695 (1991). In *Turner*, a capital defendant was entitled to have his status as an habitual felon determined *prior* to his capital sentencing hearing so he could argue the effect of that determination to his sentencing jury. If deemed an habitual felon in Mississippi, any life sentence his capital sentencing jury imposed would be life without parole. The Mississippi Supreme Court held he was constitutionally entitled to present this information to the capital sentencing jury. *Compare Bruce v. State*, 569 A.2d 1254 (Md. 1990) and *State v. Henderson*, 789 P.2d 603 (N.M. 1990) (holding capital defendant's ineligibility for parole may not be constitutionally withheld from sentencing jury), with *Commonwealth v. Henry*, 569 A.2d 929 (1990), *cert. denied*, 111 S.Ct. 1338 (1991), and *Williams v. Commonwealth*, 360 S.E.2d 361 (Va. 1987) (holding unavailability of parole irrelevant to jury's capital sentencing decision).

This division of authority led to the grant of certiorari in *Simmons v. South Carolina*, No. 92-9059 (argued 18 January 1994). *Simmons* will decide whether a capital defendant's ineligibility for parole is relevant to the sentencing jury's decision. Due process entitles a capital defendant to explain evidence of a prior crime upon which the state bases an aggravating factor or upon which the prosecutor bases an argument about future dangerousness. *See Gardner v. Florida*, 430 U.S. 349, 362 (1977). Petitioner was denied this opportunity. Thus, *Simmons* would have a direct bearing on the disposition of this case.

Respondent urges this Court not to hold this petition pending a decision in *Simmons*, asserting it inapplicable because North Carolina, unlike South Carolina, does not have life without parole. [Brief in Opposition at 23 n.3] But *Simmons* will address the underlying rationale for the lower court's decision: whether evidence of a life sentence imposed on petitioner in another jurisdiction is relevant to the sentencing

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Respondent's reliance on *California v. Ramos*, 463 U.S. 992 (1983), is equally unavailing. *Ramos* rejected a constitutional challenge to a California jury instruction that the governor could commute a sentence of life without parole to a sentence under which parole might be available. This Court reasoned such an instruction gave juries an accurate portrait of the possibility of a defendant's future dangerousness, which was a relevant sentencing determination. *Id.* at 1001-05; *see Jurek v. Texas*, 428 U.S. 262, 274-76 (1976) (holding capital defendant's future dangerousness relevant information for sentencing purposes).[2] Respondent seizes upon the concluding language and footnote in *Ramos* for the proposition that a state may limit mitigating evidence by deeming it irrelevant. [Brief in Opposition at 21-22] Aside from being at odds with the more recent *McKoy* decision, that language is taken out of context. In *Ramos*, this Court acknowledged the power of the states to provide greater protections to a capital defendant beyond the limits on evidence required by the Eighth and Fourteenth Amendments. 463 U.S. at 1013-14. The inverse of that proposition -- that states may limit what evidence of a capital defendant's background, record, or character a sentencer may consider as a basis for a sentence less than death -- is not true. A state is not free to provide lesser protections to a capital defendant that those required by the Eighth and Fourteenth Amendments. *Ramos* not only provides no solace to respondent, but actually demonstrates how the decision below directly conflicts with the settled jurisprudence of this Court.

Finally, respondent never fully comes to grips with the essence of this matter. The trial court unconstitutionally restrained petitioner's ability to have his sentencer consider, based both on instructions by the trial court and after arguments by counsel,

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[2] *Jurek* actually supports petitioner's claim. Petitioner's jury heard plenary evidence about the Virginia murder. It found an aggravating factor based solely on this Virginia murder. By using this evidence to support an aggravating factor, the state made this aspect of petitioner's background and record part of the case. In doing so, it made the sentence imposed on petitioner for the Virginia murder relevant. It became a basis for a sentence less than death in this case.

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instructions deemed potentially coercive but for the specific information there that the jury could fail to agree on a sentencing recommendation -- an alternative not made available below. Without telling the jury it could fail to agree on a recommendation and still complete its duty, the spector of coercion feared in *Lowenfield* emerged.

Furthermore, respondent cannot explain or challenge the decision below being at odds with the highest courts in Delaware, Florida, Georgia, Louisiana, and New Jersey. [Petition at 35-37, citing cases] Unlike a deadlocked jury in the guilt phase, a deadlocked jury in the penalty phase has made a final decision. No juror in that situation is required to "think it over." *State v. Rush*, 491 A.2d 439, 453 (Del. 1985). The vast majority of jurisdictions considering this issue under very similar supplemental instructions have resolved it favorably to petitioner. This stark conflict, in which North Carolina sits in the distinct minority, and the express reservation of this issue in *Lowenfield*, *see Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (granting review of lower court's interpretation of *Miranda*), create a matter ripe for this Court's review. A writ of certiorari should issue.

III. THE LOWER COURT'S APPLIED AN INAPPROPRIATE HARMLESS ERROR ANALYSIS TO CONSTITUTIONAL ERROR IN THE FRAMEWORK OF THE CAPITAL SENTENCING PROCESS UNDER MCKOY V. NORTH CAROLINA.

Petitioner suffered grossly unconstitutional sentencing instructions requiring all jurors to agree unanimously that a mitigating factor existed before any juror could consider this evidence in the sentencing decisions. *McKoy v. North Carolina*, 494 U.S. 433, 444 (1990). The lower court, on remand from this Court in light of *McKoy*, found the error harmless, relying on the trial court's polling of the sentencing jury. The

polling process contained the same fatal flaw as the sentencing instructions themselves because a reasonable juror would have understood the polling questions in light of all the instructions given.

The claim here is not, as respondent seems to suggest, whether *McKoy* error can never be harmless. Where no mitigating evidence is presented, *e.g., State v. Hunt*, 330 N.C. 501, 411 S.E.2d 806, *cert. denied*, 113 S.Ct. 3045 (1992), or where the sentencing jury finds all submitting mitigating factors, *e.g., State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, 112 S.Ct. 280 (1991), *McKoy* error is arguably harmless.[4] *See McNeil v. North Carolina*, 494 U.S. 1050 (1990) (Kennedy, J., dissenting). Rather, the question here is whether the polling process, as understood by the very jurors poisoned by the unconstitutional unanimity instructions, shows the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967).

Petitioner strongly disputes the lower court's analysis that the *McKoy* error in this case was harmless beyond a reasonable doubt. In this case, the trial court instructed the sentencing jury on at least ten occasions that it *must* answer "no" to a mitigating circumstance if the jury did not agree unanimously as to its existence. [Appendix to Petition at 64-84] For example, with respect to the mitigating circumstance of a mental illness or emotional disturbance, the jury was told, "If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, you will so indicate by having your foreman write no in that space." [Appendix to Petition at 65] There was no suggestion that each juror could have a different ultimate answer to this question. There could be only one answer for the entire jury. A reasonable juror would have

[4] Respondent relies on the denial of certiorari in *Hunt* and the failure of petitioner in *Roper* to raise the issue on certiorari. [Brief in Opposition at 37-38] These two factors are irrelevant here since both cases involved situations where *McKoy* error might be harmless due to the absence of any effect of the instructions on the sentencing deliberations. Here, such an effect undeniably occurred because the jury failed to find many mitigating factors supported by plenary evidence.

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principles of comity and federalism encourage this practice. *Sullivan* and *Brecht* are certainly such decisions, in light of the issue decided on the basis of a harmless error analysis by the lower court. Respondent offers no reason why this Court should depart from this practice here. Thus, a remand for reconsideration in light of *Sullivan* and *Brecht* is in order.

IV. THE LOWER COURT IMPROPERLY FOUND ERROR UNDER MORGAN V. ILLINOIS HARMLESS.

Petitioner tried to question prospective jurors regarding whether they would automatically sentence him to death without requiring the prosecution to prove aggravating circumstances. The trial court prevented this inquiry and the Supreme Court of North Carolina affirmed. This Court granted certiorari and remanded for reconsideration in light of *Morgan v. Illinois*, 501 U.S. ___, 119 L.Ed.2d 492 (1992). On remand, the lower court found the error harmless because

> [t]he trial court instructed the potential jurors as to the method of finding aggravating and mitigating circumstances and the consequences of doing so. The defendant *was then allowed to question the jurors as to their ability to follow the court's instruction* in regard to these circumstances *and apply the law* according to the instructions. This should have enabled defendant to determine whether to challenge a juror on the ground he would automatically vote for the death penalty if the defendant was found guilty.

State v. Price, 334 N.C. 615, 618, 433 S.E.2d 746, 748 (1993) (emphasis added). The harmless error analysis is woefully flawed.

Morgan itself found such questioning insufficient to cure the constitutional error. Inquiries about the general fairness of prospective jurors "and 'to follow the law'

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The harmless error analysis *sub judice* was not only cursory and devoid of any exacting review of the trial record, but it also relied on precisely the kinds of questions *Morgan* itself determined to be insufficient to satisfy constitutional demands. Since the lower court relied exclusively on the very voir dire inquiry held insufficient in *Morgan* itself, summary reversal is warranted. If not, because *Brecht* alters the availability of federal review by the lower court's harmless error analysis and thereby necessitates more than the perfunctory harmless error analysis done below, a remand is in order.

CONCLUSION

For the reasons stated herein as well as in the Petition for a Writ of Certiorari, petitioner respectfully requests that the decision below be reversed or that a writ issue.

This the 14th day of February, 1994.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gordon Widenhouse, a member of the bar of this Court, hereby certify that on the 14th day of February, 1994, one copy of the Reply to Brief in Opposition was served on Mr. Barry S. McNeill, Special Deputy Attorney General, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602, counsel for the Respondent herein, by first-class mail, postage pre-paid. I further certify that all parties required to be served have been served.

This the 14th day of February, 1994.

Respectfully submitted,

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